IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 789 of 1999

For Approval and Signature:

HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE D.H.WAGHELA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SACHITRAY AMIKARAY

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 789 of 1999

MR DEEPAK M SHAH for Appellant

MR KC SHAH APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE D.H.WAGHELA

Date of decision: 28/04/2005

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE M.S.SHAH)

This appeal under Section 374 of the Criminal Procedure Code, 1973 is directed against the judgment and order dated 30.6.1999 passed by the learned Addl. Sessions Judge, Jamnagar in Sessions Case No.46 of 1997 convicting the accused of the offence punishable under Section 302 IPC and also for the offence punishable under Section 135(1) of the Bombay Police Act, sentencing the appellant-accused to rigorous imprisonment for life and fine of Rs.100/-, in default imprisonment for one week for the offence punishable under Section 302 IPC, and also sentencing the appellant to imprisonment for four months and fine of Rs.50/-, in default imprisonment for one week for the offence punishable under Section 135(1) of the Bombay Police Act, and further ordering that both the sentences shall run concurrently.

2. The prosecution case, briefly stated, was that the accused- Sachitray Amikaray Yadav and deceased Mohansinh Babusinh Jadeja (husband of complainant Ushaben) were working as labourers at the Jamnagar Port and were also residing in the same neighbourhood. On 14th March 1997, the deceased returned home at about 9-15 PM and told the complainant that he had not received any labour charges that day, but his neighbour -accused herein owed Rs.75/= to the deceased and, therefore, the complainant should call the accused so that the deceased could demand the money from the accused. The complainant accordingly called the accused. The accused thereupon came near the place where the deceased was resting which was a part of the building under construction. When the deceased demanded Rs.75/-, the accused told the deceased that he was not going to pay the said amount to the deceased and the accused got excited and a scuffle ensued between the accused and the deceased. The deceased fell down from the constructed platform. When the deceased was about to climb back on the platform, the complainant started shouting but the accused inflicted a knife blow into the left side of the chest of the deceased and the deceased started bleeding. In view of the shouting by the complainant, landlady Jubedaben and Keharsinh considered by the complainant as her brother went to the scene of offence and the accused went away. The complainant thereafter went to her mother's and brother's place and they all came to the scene of the offence and removed the deceased to Irwin hospital for treatment. However, during the course of the treatment, the deceased succumbed to the injuries at 10-45 PM. The complainant thereupon lodged the FIR with the police at about 12-10 AM in the early hours of 15th March. The accused was arrested that very night. The police conducted

investigation and filed chargesheet against the accused. The accused pleaded not guilty.

2.0 At the trial -

2.1 The prosecution led evidence of complainant-Ushaben (wife of the deceased) at Exh.14 and also the evidence of landlady Jubedaben at Exh.13 and Keharsingh at Exh.15. The prosecution also examined the Doctor who had conducted the post-mortem of the body of the deceased and also the Resident Medical Officer who had admitted the accused to the hospital for treatment, after the accused was lodged into custody, at about 1-30 AM on 15th March 1997 i.e. on the night of the incident itself.

2.2 The accused in his further statement under Section 313 Cr PC denied the prosecution case and further stated that both the deceased and the accused were daily wager badli workers at the port. Sometimes they would get work sometimes they would not. On the date of the incident, neither the accused nor the deceased got any work and, therefore, they had returned home without any money. At about 9-30 in the evening the deceased had gone to the room of the accused after getting drunk and demanded Rs.75/-. The accused was not in a position to give the money to the deceased and, therefore, the deceased abused the accused and inflicted stick blows on the accused. Since the deceased gave the stick blow on the neck of the accused and was about to inflict the second blow, the accused tried to snatch the stick from the deceased and in the scuffle that ensued, the stick broke into two pieces and fell down. Hence, the deceased got enraged and took the knife for cutting vegetables and again assaulted the accused. The accused tried to prevent the deceased from inflicting the knife blows and in the scuffle that ensued, both the deceased and the accused fell down. The accused also became unconscious and was removed to the Irwin hospital where the police arrested the accused. The accused had received serious injuries which even necessitated the case being referred to the orthopaedic department where X ray was taken and the accused was also referred to the surgical department. The accused was also given treatment for the injuries sustained by him in the incident. The accused did not know Gujarati. He had come from Bihar barely four months before the date of the incident for earning livelihood in Gujarat. At the time of the incident, there was darkness in the locality. Neither the complainant nor Keharsinh were there. The deceased was in the habit of drinking and raising brawls. Four cases were already lodged

against the deceased under the Prohibition Act. The accused is innocent. The brother-in-law of the deceased is a police constable in Jamnagar and the said constable, his sister the complainant and Keharsinh got up the story and falsely implicated the accused. The accused was wrongly detained in the police station in the night of 14th March 1997 and the police got the false panchnama prepared on the next day. The accused had also filed NC complaint. At the hearing of the case, the accused also pleaded the right of self-defence.

2.3 After considering the evidence on record and after hearing the learned counsel for the parties, the learned Sessions Judge did not accept the plea of the accused that he had acted in self-defence. The learned Sessions Judge further held that the accused had inflicted the knife blow on the vital part of the body of the accused. The incised wound between the 5th and the 6th intercostal space of the deceased was about 4 cm. X 1 cm. and there was corresponding injury in the heart of the deceased of the length of two and a half cms.. The injury was sufficient in the ordinary course of nature to cause the death and, therefore, the prosecution had proved beyond reasonable doubt that the accused had committed the murder of the deceased and the case did not fall within any of the exceptions. The learned Sessions Judge accordingly convicted the accused for the offence punishable under Section 302 IPC and sentenced the accused to life imprisonment with fine of Rs.100/- and further imprisonment in default thereof, as indicated above.

2.4 It is against the aforesaid judgment and order that the accused is in appeal before us.

3. Mr DM Shah, learned counsel for the appellant has mainly submitted that even according to the prosecution case, there was an altercation between the deceased and the accused about the amount of Rs.75/- and it is not the prosecution case that there was any premeditation on the part of the accused to cause the death of the deceased. The learned counsel submitted that the incident in question took place near the room of the accused and not in or near the room of the deceased and, therefore, the learned Sessions Judge ought to have believed the defence version that it was the deceased who had gone to fight with the accused and not the other way round. Secondly, it is submitted that the accused had received injuries on his neck from the stick blow given by the deceased and that is clearly corroborated by the medical evidence and particularly the case papers for the accused at Exhs. 47

to 49 which also indicates that the accused was referred to the orthopaedic department and the surgical department, the accused was justified in defending himself and in the scuffle that ensued the knife blow given by the accused was not given with any intention to cause death of the deceased. It is, therefore, submitted that the accused acted in self defence and in any case the learned Sessions Judge grossly erred in holding that the accused had inflicted the knife blow with the intention to cause the death of the deceased. It is further submitted that in any view of the matter, the case clearly fell under Exception 4 to Section 300 and, therefore, the learned Sessions Judge erred in convicting the accused of the offence punishable under Section 302 and not under Section 304 Part II IPC.

4. On the other hand, Mr KC Shah, learned Addl. Public Prosecutor has supported the judgment of the learned Sessions Judge and submitted and that no interference of this Court is called for.

5. Having heard the learned counsel for the parties, it appears to us that since the accused admitted his presence at the place and time of incident and also admitted that there was a fight between the deceased and the accused, the only questions to be decided are whether the accused had acted in self-defence, whether the accused had inflicted the injury on the deceased with the intention to cause the death of the deceased or with the knowledge that the injury is likely to result into death of the deceased and whether the case falls under any of the Exceptions to Section 300 IPC.

6. As regards the plea of self-defence raised by the appellant-accused, though it does appear that it was the deceased who first assaulted the accused with a stick, it appears from the prosecution evidence as well as the further statement of the accused that there was a scuffle between the two and that the deceased, who was in a drunken condition, also fell down from the constructed portion near the room of the accused. In this view of the matter, it is not possible to accept the plea of the accused that he was having a knife for cutting vegetables in his hands when the accused was called by the complainant to meet the deceased and, therefore, the accused just happened to inflict the knife blow into the chest of the deceased when the deceased assaulted him with a stick. If the deceased had knife in his hands right from the beginning, during the scuffle that took place, there would have been some injuries either on the body of the deceased or on the body of the accused other

than the fatal knife blow on the chest of the deceased and the stick blow on the neck of the deceased. From the evidence on record, it appears that after the deceased quarrelled with the accused for the accused not returning Rs.75/- to the deceased and after the deceased gave a stick blow on the neck of the accused and after the stick broke into two pieces, the accused who was just a few feet away from his room, went into his room and came out with a knife and inflicted the knife blow into the chest of the deceased. In this view of the matter, even though the accused would be justified in invoking the plea of sudden and grave provocation, inflicting the knife blow on the chest of the deceased, who was not only the neighbour of the accused but was also going with him for working at the port, was definitely in excess of the right of self-defence.

7. It cannot, however, be overlooked that the incident in question took place near the room of the accused and not inside or near the room of the deceased. Admittedly, it is the case of both the prosecution as well as the defence that on the date in question, the deceased and the accused had not earned any labour charges and the deceased wanted the accused to repay the amount of Rs.75/- which the accused declined to return as he had not earned any money on that day. Admittedly, it is also the case of both the prosecution as well as the defence that the aforesaid dispute about returning the amount of Rs.75/- on that particular day was the only cause of the scuffle between the deceased and the accused. Apart from absence of any enmity between them or even any animosity, it is the case of the complainant i.e. wife of the deceased herself that both the deceased and the accused were doing labour work at the port together and that the accused used to address the complainant as Bhabhi (brother's wife) and that it was the deceased who had taught the accused how to do the work at the port i.e. carrying the food grain bags at the port. Both the deceased and the accused used to leave for work together and were also returning from work together. In this view of the matter, the question of the accused having premeditated to cause the death of the deceased is not even the prosecution case. Admittedly, the scuffle between the deceased and the accused had taken place all of a sudden only on the question whether the accused should return the amount of Rs.75/- to the deceased. We, therefore, fail to appreciate as to why the learned Sessions Judge has not considered the aforesaid aspects and even if the plea of self-defence were not to be accepted why the case would not fall under Exception 4 to Section 300 IPC, which reads as under:-

"Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.

Explanation.- It is immaterial in such cases which party offers the provocation or commits the first assault."

8. It is the specific case of the defence, as indicated in the further statement of the accused under Section 313 Cr PC, that the deceased had hit the accused on the latter's neck with a stick and the stick broke into two pieces and the two broken parts of the stick were recovered by the police at the scene of the offence. This version is corroborated by the medical evidence as found in the medical case papers recording the examination of the accused by the Medical Officer of the Government hospital after the accused was arrested and taken from the police custody to the hospital on the next day. Apart from this injury on the neck of the accused finding place in the medical case papers, the said case papers also disclose that looking to the injury, the accused was referred to the orthopaedic department and the surgical department. In view of these endorsements on the medical case papers, the learned Sessions Judge ought not to have brushed aside the case of the defence merely by observing that the injury was a minor one. The defence version is also required to be examined in light of the prosecution case itself as stated by the complainant in her cross-examination that the accused was hit by stick, but it was the complainant who gave the stick blow to the accused when the accused and the deceased were fighting with each other. The complainant herself has further stated in her evidence that when the deceased and the accused were involved in the scuffle she was trying to pull the deceased away from the accused, but the deceased was not relenting and after the deceased fell down from the constructed portion, while the accused did not try to chase the deceased, the deceased instead of going back to his room, was again trying to climb up the constructed portion obviously with a view to attack the accused. Moreover, even Jubedaben, the landlady who was examined as a prosecution witness, stated in terms that the deceased was in the habit of drinking and on that particular occasion the deceased was drunk when he was fighting with the accused. On the other hand, the complainant did not even allege that the accused was drunk. The fact remains that if the deceased, in a

drunken condition, had hit the accused with a stick on the neck of the accused and even after falling down tried to go back to the accused, even if the knife blow given by the accused to the deceased on a vital part like left lower part of the chest of the deceased may appear to be in excess of the right of self-defence of the accused, it certainly cannot be said that the accused had the intention to cause death of the deceased. Of course, the injury inflicted by the accused on the left portion of the chest of the deceased was on a vital part of the body of the deceased and the injury was sufficient in the ordinary course of nature to cause death of the deceased. The accused must, therefore, be imputed with the knowledge that the injury being inflicted by him upon the deceased was likely in the ordinary course of nature to cause death of the deceased.

9. In our view, therefore, although the accused did cause the homicidal death of the deceased by inflicting the knife blow on the chest of the deceased, the case would be covered by Exception 4 to Section 300 and, therefore, the case would fall under Section 304 IPC.

10. The next question is whether the case would fall under Part I or Part II of Section 304 IPC. As already discussed above, looking to the relations between the deceased and the accused and the cause of fight between the two, it cannot be said that the accused had any intention of causing death of the deceased or that the accused had any intention to inflict any such injury on the body of the deceased which would in the ordinary course of nature cause death of the deceased. Hence, the case would not fall under Part I of Section 304, but would fall under Part II of Section 304 IPC.

11. In view of the above discussion, the conviction of the accused for the offence punishable under Section 302 IPC has to be altered to conviction for the offence punishable under Section 304 Part II IPC.

12. Coming to the question of sentence, it is required to be noted that the incident in question took place in the late night of 14th March 1997 and the accused was arrested on the same day. The accused is in custody since then. Even during pendency of this appeal the accused remained in jail all throughout and he has not been able to enjoy any temporary bail. The accused enjoyed furlough leave only once - when he was granted furlough in September 2004 for a period of 21 days, the accused returned three days before the stipulated date. It appears that the accused was only 30 years of age on

the date of the incident and had migrated from Bihar to Gujarat only four months prior to the date of the incident to eke out his living and on account of the aforesaid unfortunate incident, the accused has remained in prison for the last more than eight years. Considering the fact that the accused is convicted only for the offence under Section 304 Part II IPC, in our view, the accused does not deserve to be sentenced to imprisonment for any period longer than the sentence already undergone by him. In the facts of the case, looking to the period of imprisonment already undergone by the accused, there is no warrant for imposing fine on the accused for any offence.

13. Accordingly, the appeal is partly allowed. The conviction of appellant- Sanchitray Amikaray Yadav for the offence punishable under Section 302 IPC is altered to conviction for the offence punishable under Section 304 Part II IPC. Since the appellant-accused has already undergone imprisonment for 8 years and one month, the appellant-accused is sentenced to imprisonment for the period already undergone.

The conviction under Section 135(1) of the Bombay Police Act is confirmed and the sentence of four months for the said offence is also confirmed. However, the sentences for both the aforesaid offences are ordered to have run concurrently.

The appellant-accused shall be released from jail forthwith, if not required in connection with any other offence or case. The Appeal is accordingly partly allowed to the aforesaid extent.

(M.S. SHAH, J.)

(D.H. WAGHELA, J.)
zgs/-